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ALEXANDER L. STEVAS,
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NO. 80-1954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN E. WILLIAMS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

1.

Whether the Court of Appeals of Georgia correctly concluded that under the facts of this instant case Petitioner, who was thoroughly preoccupied in the process of unloading bales of marijuana in an open field, possessed a reasonable expectation of privacy from surveillance from an airplane flying at a legal height overhead?

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PART ONE

STATEMENT OF THE CASE

(i)

From his conviction in the Superior Court of Tattnall County on May 9, 1980, Petitioner pursued a direct appeal to the Court of Appeals of Georgia. On

January 28, 1981, the Court of Appeals of Georgia affirmed Petitioner's conviction and sentence. On March 4, 1981, Petitioner's petition for a writ of certiorari filed in the Supreme Court of Georgia was denied. Thereafter, this timely petition for a writ of certiorari followed.

(ii)

Pursuant to information received from United States Customs, the Georgia State Patrol dispatched a surveillance plane over a large generally wooded area in Tattnall County, Georgia, which was owned by Petitioner Norman Williams. The land, which partly fronted the banks of the Ohoopee River, had on it a trailer and airstrip.

The two airborne police officers, a state trooper and a Georgia Bureau of Investigation agent (GBI), flying at a legal height above the ground, spotted an airplane at rest on the airstrip near a trailer in the approximate center of the property, along with two trucks and other cars parked nearby. They saw one of the trucks in an open area near the river, and objects were being unloaded which the two airborne police officers rightly observed to be bales of marijuana. The airborne police officers then notified other police officers on the ground who had arrived outside the fenced premises. These officers immediately shot out the lock of a gate across the road, entered, and following directions given them by

the airborne police officers proceeded to the river area and arrested co-defendant Pianka and co-defendant Davis in the truck. Forty-five bales of marijuana were found secreted under nearby vegetation at the side of the road. Prior to making these arrests and discovering the secreted marijuana, the police officers came upon Petitioner in a jeep, who upon seeing the law enforcement officers, attempted an unsuccessful evasive maneuver.

The police officers on the ground met the two airborne police officers who, in the meantime, had landed on the airstrip.

The testimony at the bench trial clearly established that the ground party was too small to contain the pre-

mises without entry, that it took over three hours to return to town and obtain a search warrant (which was obtained for the examination of the trailer), and that the report of State Trooper Little, who was in the surveillance plane, of the activities of the Petitioner and his co-defendants and the resemblance of the observed objects to bales of marijuana, combined with previous information regarding suspected illegal activities at the place of the arrests, all combined to establish probable cause to believe a felony was in progress. This set of circumstances, coupled with the existing exigent circumstances, made immediate action by the law enforcement officers necessary.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

THE COURT OF APPEALS OF GEORGIA CORRECTLY CONCLUDED THAT UNDER THE FACTS OF THIS INSTANT CASE PETITIONER, WHO WAS THOROUGHLY PREOCCUPIED IN THE PROCESS OF UNLOADING BALES OF MARIJUANA IN AN OPEN FIELD, POSSESSED NO REASONABLE EXPECTATION OF PRIVACY FROM SURVEILLANCE FROM AN AIRPLANE FLYING AT A LEGAL HEIGHT OVERHEAD.

As revealed by an examination of the synopsis of the facts of this case as set forth in that portion of this brief labeled Statement of the Case, Petitioner, who had attempted to secret his illegal drug activities by conducting

them in the middle of a large fenced piece of property, was plainly observed in the midst of unloading bales of marijuana by a Georgia State Trooper and a GBI agent flying at a legal height in an airplane overhead. In the Court of Appeals of Georgia Petitioner, relying primarily upon this Court's decision in Katz v. United States, 389 U.S. 347 (1967), unsuccessfully contended that the subject overflight violated his constitutional right to expectations of privacy. Here on this petition for a writ of certiorari Petitioner, in an attempt to acquire issuance of the writ, has overly simplified the opinion of the Court of Appeals of Georgia. Petitioner summarily contends that the Court of Appeals "relied squarely" on the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924). (Petition for Writ at 5).

Seeking issuance of the writ, Petitioner has inappropriately framed the issue, as set forth in that portion of his petition labeled "Reasons for Granting the Writ," so as to convey the impression that the Court of Appeals of Georgia summarily opined that the subject surveillance took place in an "open field" thus there existed no unreasonable search.

Contrary to Petitioner's assertions however, an examination of the Court of Appeals decision reveals that in reaching its conclusion that Petitioner's motion to suppress the seized contraband was properly denied, the Court of Appeals of Georgia properly applied settled federal legal principles to the issue presented. In its analysis of the merits of Petitioner's assertion that the subject

overflight violated his constitutional right to expectations of privacy, the appellate court correctly turned to this Court's opinions in Hester v. United States, 265 U.S. 57 (1924), and Katz v. United States, 389 U.S. 347 (1967). After an examination of these authorities, along with other cases not cited herein, the appellate court correctly ascertained that not only must Petitioner possess an "expectation of privacy," but that the expectation of privacy must be reasonable or justifiable.

> "The Government's activities in electronically listening to and receiving the Petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourteenth Amendment." Katz v. United States, supra, at 353. Accord,

United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976).

In this regard the trial court stated:

> "The mere fact, however, that the person observed has an expectation of privacy is not the whole story; if it were, every harborer of contraband would be entitled to immunity from observation because surely unless he expected to remain undiscovered he would not risk possession of property carrying a highly undesirable penalty. The expectation must be reasonable, ..." Williams v. State, 157 Ga. App. 476, ___ S.E. 2d ___ (1981).

Applying the proper legal principles, as set forth above, to the facts of Petitioner's case, the appellate court found Petitioner's contentions that he possessed not only an expectation of privacy, but also a reasonable expectation of privacy to be without merit.

Noting that the sky, like the road, is a highway over which those licensed to do so may pass so long as they keep a proper vertical distance between their craft and the property of others, the trial court concluded that:

> ". . . it is no more unreasonable to expect an airplane to fly over a farm or wooded area at a legal distance from the ground as provided by federal regulations than to expect a passer-by, whether he be a police officer or not, to look past the strand of barb-wire separating an open field from a highway . . . ." Williams v. State, supra, at 477.

The appellate court's conclusion that Petitioner possessed no reasonable expectation of privacy from overflights is especially true under the facts of this case as Petitioner chose to

locate his illegal activities in an expansive argricultural area where the use of airplanes by farmers and resulting overflights are usual and everyday occurrences.

As the foregoing analysis reveals, the Court of Appeals of Georgia, applying settled federal legal principles, properly concluded that the aerial observation of Petitioner's illegal activities did not constitute an illegal search and seizure under the Fourth Amendment. Thus, Petitioner's assertions to the contrary are without merit and cannot serve as the basis for the granting of the requested writ.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

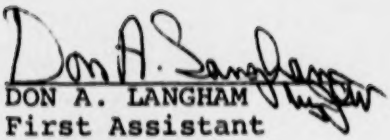
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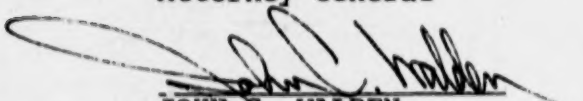
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CERTIFICATE OF SERVICE

I, Harrison Kohler, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief for the Respondent in Opposition upon the Petitioner's attorney by depositing a copy of this Brief in the United States mail with proper address and adequate postage to:

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This 30th day of June, 1981.

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